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ABSTRACT

A discussion of the two legal traditions illuminates this comparison of student rights in common and civil law nations. The United States is among a minority of nations that use common law, a complex system cluttered with processes difficult to explain and loaded with protections for defendents in both criminal and civil cases. In American common law, children have only gradually been granted certain civil rights belonging to adults. As the states have matured politically, they have become both more protective and more restrictive of children's rights. The courts in the American system can only define student rights case by case. In civil law nations, courts do not define rights, which are stated in the constitution and the code of laws. In these documents, the meaning and intent of the law are supposed to be obvious. Civil law nations acknowledge the family as the locus of individual rights, while in American common law individuals are increasingly recognized as having rights separate from the family. Eventually, American courts and legislative bodies will have to decide to what extent it is possible to weaken the family structure and preserve other social institutions.
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STUDENT RIGHTS IN THE U. S. AND CIVIL LAW NATIONS

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A discussion of student rights in common and civil law jurisdictions requires a description of both legal traditions. Neither common law nor civil law nations have well defined bodies of law referred to as student rights. Student rights in both traditions must be examined in the contexts of constitutional law as it affects civil rights, that body of positive law which treats the family and school, and finally the administrative law of schools and the latitude afforded it by constitution and statute.

American common law is, in its origins, English common law, but the American variety even well before the revolution was clearly not a duplicate, or simple transplantation of the English common law. The common law on the western side of the Atlantic varied from colony to colony. Massachusetts, New York, and Virginia had well developed bodies of common law by 1776, but each was somehow distinctive, partly because of its origins--Puritan, Dutch, Royalist. But common law by its nature flowers differently in different seed beds.

English common law became more national through the 19th century, while common law in the United States developed from the law in eastern states, adapting the borrowed law to local customs, and in the Southwest, preserving Spanish and French common law. Louisiana is the only American state to adopt consciously the French civil code, but it has elements of American common law mixed in its tradition.

American common law continued to borrow from English common law after the revolution; one example is the battered but handy principle of sovereign immunity of the state's institutions. But that principle is a fine example of the American common law in many respects. The English courts dropped the principle long before American courts began to change their minds on the matter. The status of sovereign immunity varies from rock-like consistency in some states through selective application, as in Illinois, to near complete rejection in California and Pennsylvania. Courts in every state proclaim the right to abrogate it or preserve it, partially or entirely. In some states, legislatures have restored it, after courts buried it in the 1970s.

The common law nations are very few compared to the number of nations whose tradition is the civil law. A handful of English speaking nations preserve the common law tradition; most commonwealth nations, formerly under British control, adopted a civil law code after independence. The civil law systems are much more economical in time, personnel, and sources. Above all, the civil law systems are neater, more compact, and easier to learn. By comparison, common law systems are much more complex, cluttered with hard-to-explain processes, and loaded with protections for defendants in criminal and civil cases. The complexity of the common law tradition is reflected in the volume of its reports and digests. The mass of printed materials required for understanding and researching the American court cases literally strains most libraries. Few libraries have complete or even extensive collections of cases.

America's legal system is redundant--state and federal systems have lower, intermediate and higher courts. Civil law systems are unified--there is but one system of courts. Unsurprisingly in such a luxuriant growth of cases in the many-court system, the number of lawyers is huge. The United States has not only the largest number of lawyers in the world, but its practicing and accredited lawyers possibly come close to equaling those in all the rest of the non-communist world.

The common law is a quilt of many pieces, with patches, irregular borders, frayed areas, and some designs almost impossible to discern. It is not a rational system, with laws logically flowing from the first principles of the constitution, and positive law. Instead, it is a jumble of contradicting custom and constitution, customs which were unaffected by the constitution, and statutes in clear conflict with each other. Judges preside over the entire amalgam, sorting out what portion of the common law shall remain, what statutes will stand constitutional scrutiny, and what the constitution means today.

No one can predict the course of civil rights in our common law system. Certainly history is no reliable guide to the growth of the rights of individuals. The three amendments designed as a Bill of Rights for ex-slaves were ignored or interpreted for seventy years as favorable to corporations against state statutes designed to protect women, children, laborers, and farmers. The breakthrough toward civil rights of individuals in the Supreme Court beginning in 1954 was probably due less to social pressure than to the inclination of the chief justice. Certainly the federal

courts did not depend upon legislation, either federal or state, in their opinions which set aside segregation. Nor did the courts follow legislative precedent in requiring full rights of due process for juvenile offenders in the Gault case.[1] The landmark Tinker v. Des Moines[2] case, and later the Goss v. Lopez[3] and Wood v. Strickland[4] opinions rested heavily upon the precedent of Brown v. Board of Education.[5] Administrative law of school districts and state education statutes had ignored due process requirements for students. Common law courts depend on prior cases as precedents. But the judge is free to select which cases, portions of cases, arguments, or minority opinions as controlling precedents.

Common law proceeds on a broken front. Some aggrieved person, not content with a customary lack of due process or full access to what the law provides, pleads for remedy and a court agrees with the plaintiff. The constitution is reinterpreted--the plaintiff is found to have a right which the judge discovers has been in the constitution.

The revolution in the civil rights of individuals since the mid-twentieth century owes much to the application of the principle of substantive due process. The substantive due process doctrine evolved from a reading of the 14th Amendment which interpreted that article to require that due process of law be extended to all persons. Restriction of the due process protection to certain persons and not others has been found to be unconstitutional. Much of the civil and criminal law development of the United States since 1954 has consisted of individuals testing whether they, too, were not entitled to formal notice and hearing before punitive action was taken against them, or of individuals who had been

excluded from benefits and processes of law challenging the bases of their exclusion, such as race, sex, age, or income level. Each individual represented a class or group aggrieved. Each remedy granted by the courts brought the aggrieved class more closely to full protection of the entire constitution.

The development of substantive due process, similar to the discovery of a scientific principle, was an example of the American common law system at its best. The judges took not only precedent cases but political science, historical jurisprudence, political philosopy, and psychology into account in order to build the doctrine. Judges, not jurisconsults, or legal commentators, and not the political scientists, constructed the doctrine. It is now so solid that one cannot read the words "due process" without questioning whether procedural or substantive is to be construed. The process is rational only in retrospect. The doctrine is now viewed as rational, fully integrated into constitutional law, but at first it was speculative. As judges used each other's reasoning and built upon the growing consensus, their opinions added to the structure. The beginnings of the doctrine were choice, value, inclination, or insight buttressed by the rest. Our courts have long accommodated those who claimed a strict-precedent orientation, almost a mechanistic approach, and those such as the late nineteenth century jurists and of the Taft Court, who found any threat to control of corporate property unconstitutional. They were judging substantively whether they knew it or not.

The civil law tradition begins with the civil code, commissioned by Napoleon in the early 19th century. Voltaire had said that every time a man changed horses during a trip through France, he also alighted into a different set of laws. France, divided into ancient common law and Roman law areas, was a confusion to legal scholars and lawyers. Napoleon's idea behind the code was to provide a book which was readable to layman who then would no longer need lawyers to help them. The Code had to be well organized, simple but comprehensive, not too great a break from those institutions and customs which people valued most highly, but which at the same time removed hindrances and clutter to peoples' lives

Hence, the Code made civil (non-religious) enactment of marriages possible but preserved the family as the basic social unit of the state. The father's powerful role in the family was preserved but women were allowed joint rights over property along with their husbands. Divorce was made possible but not easy.[6]

The civil law tradition rests upon political theory and philosophy which can be readily identified. The social contract underlies the power of the state. Mankind has delivered to the state certain rights in return for security. The state in turn deeds back certain rights, hedged about with certain conditions.

The civil codes grant certain rights. They do not acknowledge, as the United States Constitution does, that all powers not specified ". . . herein are reserved to the states respectively, or to the people."[7] Brazil's constitution of 1967 contains a Bill of Rights in Article 153 which guarantees that all Brazilians and other residents of the country:[8]

1. Are equal before the law without distinction as to sex, race, work, religious creed, and political convictions (S 1),
2. May display political or philosophical ideas or conviction without censure; have the freedom to reply publicly; may publish books, journals and periodicals without the permission of authority (S 8),
3. Are entitled to speedy arraignment for the person accused of a crime, before a qualified judge (S 12),
4. Have the right to a trial by jury to judge the accused of serious crimes (S 18),
5. Have the right of habeas corpus in criminal cases (S 20),
6. Have the right of mandamus (Mandado do Seguranza) to protect clear rights against the abuse of authority not assured by habeas corpus (S 21),
7. Have the right to assemble, without arms (S 27),
8. Have the right to legal assistance to those in need of it (S 32).

The specification of these and other rights in the same article does not exclude others mentioned elsewhere in the Constitution (S 36). That section does not guarantee rights not specified in the constitution, nor does it reserve unspecified rights to the various states. Brazil, typical of civil law nations, doesn't delegate rights for distribution, by its subdivisions. Its law is national, of one piece, everywhere. Brazilians have those rights which are specified, not those which are unspecified.

The civil law tradition assumes the state to be a fragile entity, to be carefully protected. Rights which are specified are described

carefully, and exceptions are noted, of which the right to assemble in S 27, above is an example. Hence, constitutions are lengthy documents. And they are frequently replaced. The English and American models are hardier. The American constitution is brief, only infrequently amended with succinct articles. Anglo-American common law assumes that nations are tough, stable, and dependable entities. Little preoccupation with the existence of the state is noticeable in the American constitution, or in the English constitution.

Students and Rights

The United States Constitution first mentioned age as a category of citizen in 1971, when the 26th Amendment was passed allowing those who have reached age 18 to vote. The Brazilian constitution in Article 147 likewise grants the right to vote to those 18 and above.

In American common law, only gradually have children been granted certain civil rights which have belonged to adults. The common law system is empirical, not deductive. Gradually, given changed social circumstances, courts concluded that minors were entitled to certain rights, but the common law has shifted over the years. Cases were decided partly from precedent, partly from what was deemed to be social policy. Judges in the common law system have never really been formed completely by precedent cases, but by those facts which the judge felt were compelling.

In the nineteenth century United States, children were treated as adult offenders until the close of the century.[9] Along with the rise of the juvenile courts of the twentieth century, children lost what were once their privileges to go to work, buy liquor and tobacco, marry, and enter

into contracts. Frontier territories did not withhold these rights from minors, but as states matured politically, they restricted the rights of children. The states become more protective as well as more restrictive, due to the demands of laboring groups, the influence of children's welfare groups, and an ever growing urban middle class.

The Brown I case[10] was about children. The children of a minority group were found to be deprived of equal educational opportunities which was a denial of equal protection of the laws.[11] The opinion was based in part upon social science research showing feelings of inferiority in children who had been segregated[12] as well as the power of the school in "awakening the child to cultural values."[13] Precedent cases in elementary education were set aside, given the datum that education was the "most important function of state and local government,"[14] and that the educational systems in question had not served all children equally.

The Brown case was heavy with empirical justification for the opinion. There was much less attention given to constitutional theory. The emphasis was on what effects the segregated schooling had on children; therefore it was a substantively-based opinion. Children had rights. Warren did not say that they had been dormant, or that they were waiting to be discovered or that they were somehow implied, nor did he say that the precedents of court decisions led one to the logic of his opinion. The statutes mandating segregated schools were set aside.

Brown is the foundation for all subsequent child rights and student rights cases. State legislatures did not form up quickly to march to the beat of Warren's drum. Nor did state legislatures extend children's rights

beyond desegregation. In the Gault decision of 1967, Justice Fortas stated that "being a boy does not justify a Kangaroo Court."[15] The juvenile courts which were originally established to protect the interest of children had come, two-thirds of a century later, to ignore due process in committing a boy to a detention home for three years. No notice to Gerald Gault or to his parents, no attorney, no hearing of the boy's side, no witnesses for the boy, and no evidence were admitted to the hearing, and no appeal was allowed him by the state of Arizona. If children had rights to equal protection of laws providing schooling, they had equal rights to notice,[16] counsel,[17] and confrontation and cross examination of witnesses.[18] Equal protection of the laws applies to court procedures as well as schooling for children.

Justice Fortas wrote in the Tinker v. Des Moines opinion, "School officials do not possess absolute authority over students. Students in school as well as out of school are 'persons' under our constitution."[19] If school officials could not, even under state statues, keep children racially segregated, they clearly did not have absolute authority over students. Classification by race prior to 1954 had seemed reasonable and necessary tc many school authorities. But the Brown case limited what had seemed to be school boards' and administrators' plenary powers. Freedom of expression by wearing armbands is arguably constitutional if children have a right to full equality of education. A right to schooling by children confers at least some civil rights on those children. It is for the courts to continue the enumeration of the full list of rights which children have.

Justice White's opinion in Goss v. Lopez stated students' property right to schooling which was protected by the due process clause of the Constitution.[20] The indispensable elements of notice and hearing, no matter how rudimentary, were required for suspensions of ten days or less.[21] If schooling cannot be limited on account of race, under the Fourteenth Amendment, neither can a child be deprived of a portion of it without showing cause. The student's liberty interest, good name or reputation, cannot be taken away arbitrarily.[22] Due process was defined and extended in this case, which rested squarely on the student's right to that schooling provided by the state--the heart of the Brown case.

Just how important a property right schooling is, was made dramatically evident in Ingraham v. Wright.[23] Justice Powell found that the Eighth Amendment, preventing cruel and unusual punishment, did not apply to school children, but was necessary to protect prisoners from brutality. Depriving students of schooling without due process was much more serious than punishing them severely without notice or hearing. The Supreme Court in this case made a bow twice to common law of the state of Florida, once when it saw the common law as allowing "as much corporal punishment in schools as is reasonably necessary for the proper education and discipline of the child,"[24] and again when it held that common law remedies (such as suing under tort law for excessive punishment) were available to those who might be abused.[25]

The Supreme Court in the line of cases described above defined the Constitution to include certain rights as belonging to students. The

courts in our system cannot sweep all rights into students' hands with one stroke, only that or those in question in the case. Hence, whether it is logical for states to prevent minors from buying beer or driving cars at age 15, or making contracts to buy cars, at the same time the Supreme Court has granted free speech and due process in hearings, not to mention the right to choose abortion or buy contraceptives, is not a question which can be answered in the common law system. One question at a time is asked of a court, and only that question can be answered. The logic pertaining only to that question is relevant, regardless of its possible effects on other questions which might be asked later. What might happen or logically will happen occurred to the aging Justice Black, but it was sheer speculation. By the way, he was right in foreseeing the dropping of the voting age, as well as the right of running for school boards for those over 18.[26]

In the civil law system, courts do not define rights. They are stated in the Constitution and the Code of Laws. Those rights not granted by the state in those documents do not exist and cannot be claimed.

The common law is Baconian, empirical, but the civil law is deductive. Given a constitution and a code, the judge makes a decision as to the way he or a scholar of the law (a jurisconsult) understands the meaning of the constitution or statue. There are no implied laws, no finding of law by judges. Such a word as "penumbra" of rights used by Justice Douglas is not heard.

The civil law is carefully drawn up so that judges do not have to strain at the meaning of the words. The meaning of and intent of the law is supposed to be obvious. Of course, there is room for interpretation, otherwise there would be no need for judges. But judges have much less latitude to explain the intent of the law, or to compare statute with court-made or judge-made law.

A civil law judge does not compare a statute with the Constitution. In West Germany, the Supreme Court of the Republic can find a law unconstitutional, but this is rarely done. In France, the Supreme Court of Cassation can examine the constitutionality of a statute, but the court is very cautious in exercising that power.

American legislatures are so used to state courts interpreting and defining statutes that they commonly pass legislation which they know to be in conflict with prior legislation, or which they know may be found unconstitutional. In civil law nations, legislative bodies are more cautious in enacting statutes which are in conflict with existing statutes or the constitution.

The civil law tradition is positivistic. Legal positivism in one sense means that the law is its own reason for being. Nothing is above the law as enacted. There is no law of nature or of God superior to the enacted law. Law enacted by men is necessary, therefore good and sufficient, according to the positivist tradition, in a society which exists as a result of the social contract. People need laws in order to live peaceably. That is enough reason for the law. Laws which are enacted therefore are legitimate and necessary.

Legal oppression is not uncommon in civil law nations. The Nuremburg laws could not be challenged on substantive grounds. There is no higher court to appeal to in a civil law nation than the same positive law which binds citizens. The Supreme Court of Germany in the 1930s had no higher law against which to match the Nuremburg laws.

Once a citizenry, or a sizeable portion of it, finds the positive law to be unfair, or literally killing, that citizenry must uproot that law and start over with a new one. Civil law nations throw out constitutions or codes and enact those more to their liking. The Mexican people after the upheaval from 1910-1917 could not live with the constitution of Juarez and Diaz. The people of Egypt had to write constitutions in 1920, 1952 (after throwing out King Farouk), 1957 (after Nasser became president), and after Nasser in 1973.

Student rights in Brazil, for example, are found in family law and education law as stated in the Constitution of 1967, and the Code of Law. Article 175 of the constitution states that the family which has been established by marriage has the right of protection of the public power.[27] Section four of the same article calls for a special law to provide assistance to pregnant mothers, infants and adolescents, as well as education for exceptional children. Free compulsory public education is assured to all between the ages of 7 and 14.[28] Free secondary and higher education is promised to all those who show proper achievement but who lack financial means to pay for such education.[29] Each school system is obligated to provide pupils the necessary conditions for efficient learning.[30]

The rights of children are constitutionally cast in the context of rights to receive assistance. In the political rights section, referred to above, 18-year-olds have the right to vote.[31] Exceptional children in the United States were not found to have equal rights to education until federal courts found in the PARC[32] and Mills[33] cases in 1972. Given the statements in the constitution, litigation is not necessary in Brazil to include any group which has been given short shrift by local school authorities.

In Venezuela, the Organic Law of Education, enacted in 1980, protects students from corporal punishment or affronts to the extent that a teacher commits a grave offense by inflicting either on a student.[34] The punishment for such an offense is determined by the Minister of Education. The first offense is punishable by a separation for one to three years from one's position. The second offense carries a three to five year separation.[35] The law does not specify how hearings are to be held by administrators.

Students' rights are protected but they too must act responsibly. Students commit a grave offense by:

1. Interfering with the normal development of school activities or seriously disrupting discipline.
2. Committing violent acts of word or deed against any member of the education community (a student for example), a teacher, administrator or non professional employee.
3. Provoking serious disorders during any evaluation period or participating in acts which affect the school's efficiency.

4. Damaging or destroying willfully school property buildings, or equipment.[36]

The above acts are punishable, according to their seriousness, by

1. A teacher suspending the student from the school; once the teacher has proof of the act, or
2. A principal's temporarily suspending the student from the school, or
3. The council of teachers expelling the student for an academic year, or
4. The Minister of Education expelling the student from school for two years.[37]

Repetition of the offenses mentioned can result in doubled punishment.[38]

The Minister's decisions in the above case is subject to administrative hearing, with the level or levels unspecified. The Minister is the officer of appeal for decisions made by lower administrators concerning discipline of students.[39]

The right of appeal is thus protected in the law, but no mention is made of other due process procedures such as witnesses and notice which are so conspicuous in the Administrative Educational Law of Pennsylvania[40] and the opinion in the Goss-Lopez case.[41] More discretion is left to administrative persons and bodies in the civil law nations, with consequently more concern for order, lack of interruption of the rights of those who wish to learn.

An interesting article early in the Organic Law of Education prohibits the publication and distribution of printed material or other forms of communication which cause fear in children, incite them to hatred, agression or indiscipline, which degrade the language or which are contrary to public morals, good customs, or healthy public values. At the same time, the laws must regulate advertisement in order to defend the mental and physical health of the nation.[42]

The U.S. Common Law tradition has, since 1954, stressed substantive and procedural rights for individuals. The substantive rights of American students have not been identified in a code as in Venezuela, but the substantive rights have expanded since Tinker v. Des Moines.

No attempt has been made to list or identify a body of constitutional rights. The process of expanding substantive rights is by test and discovery of the meaning of the constitution.

In the civil law tradition students are guaranteed those rights which are listed specifically. Discovery of others not in the code is not possible. The courts of Venezuela or Brazil are not asked to determine whether certain rights not listed in the code belong to students or minors.

The body of procedural rights of minors and students in the U.S. has grown greatly since In Re Gault. Procedural rights are due to very young children under PL.94-142. As courts have expanded procedural rights, administrative law has become vulnerable to challenges by minors.

Administrators and board members are liable to suit for remedying students' procedural rights have been deliberately curtailed.

In the Venezuelan and Brazilian codes, few statements are directed to procedural rights of students and minors; administrative law is not subject to review by courts with respect to its procedural guarantees for students or minors. Suits for infringement of procedural rights are not possible so long as the administrator has acted under the law and not exceeded the bounds of the law in administering rules.

A powerful protection for the child under Venezuelan and Brazilian law is the family. The state can take responsibility for a neglected child and protects certain interests of the child - to be educated, and against physical punishment in school, as in Venezuela. While the law protects the child, the family is recognized as that unit which protects and looks after the interest of the child. For the child of the family which is intact this protection is powerful. Without the family, the child lacks its powerful support.

The common law requires aggrieved people to enter court where their lawyers argue against administrative law or statue which has systematically discriminated against them on some basis. Gradually, positive law caught up in the United States with court orders which stated clearly the rights of Black children, those with learning difficulties, or institutionalized children. Our common law differs from state to state concerning the rights of children to receive an equal education regardless of their

residence in poor or middle income areas. In Brazil it is clear that whatever the state provides to elementary age children is available to all.

The civil law tradition sees the explicit language of constitution and positive law as directives to administrative units. These units must follow the law. Under American common law, more typically rights emerge or unfold with interpretation by judges.

The Goss, Tinker, PARC, and Mills courts set aside administrative law, finding it substantively in conflict with the Constitution. In American school cases, the common law, given the powerful principle of "in loco parentis" was the basis of much of the substantive law which allowed schools to segregate children who might be too "different" or hard to instruct. The same principle underlay the school boards' and administrators' perceptions of administrative law. Administrative convenience was of a piece with "in loco parentis." The "in loco parentis" principle had an overly large penumbra which allowed great latitude to school districts.

The civil law tradition, explicitly recognizes the family as the locus of individual rights. In the civil code of Spain, used in the Philippines, "The father or, in his default, the mother may exercise parental power over their unemancipated legitimate children; and children are bound to obey their parents while subject to such authority and at all times to treat them with respect and reverence."[43]

Parents must support their children, educate them, and represent them in the exercise of all actions which may contribute to their welfare.[44] They have the right to correct and punish them in moderation.[45]

The foregoing parental rights over children could be terminated by the state if the parents treated the children with excessive harshness, or corrupted them.[46]

In a state which has nearly unbounded power, and where individuals have only rights explicitly granted, the family is the child's main protection. The family and parents with their extensive power have the legal right to educate the child in private or public institutions.

In American common law the parents and families were recognized as having extensive power over children. When the state tried to limit this power by requiring certain kinds of schooling or limiting parental choice in education, the Supreme Court denied the states' overly broad claims in the Pierce v. Society of Sisters[47] Meyer v. Nebraska,[48] and in the beautiful Wisconsin v. Yoder opinion.[49]

In the civil law nations, the indidivual is seen as a member of a family unit. The loss of the individual to the family is deemed to be so serious that the family is seen to have a special interest in the rights of each of the members. Hence, the parents have explicit powers and responsibilities to keep the unit intact. The state needs a strong family and the family is supported in turn, by the state so that it can remain intact.

In American common law, the individuals are increasingly recognized as having their rights separate and apart from the family. Parents no

longer need be informed by physicians about treatment of pregnancy or venereal diseases of their children. Married women are gaining separate rights to property in those states where they do not already have joint rights to property. Children have rights to schooling, and have full due process rights in criminal or disciplinary cases. The parents do not necessarily have the right to represent children in such cases, but must be informed.

The common law tradition in the United States covered family relations, with little or no attention from positive law until the courts began to define and limit parental powers. While the states have had the power to remove children from careless and abusive parents, that protective and preemptive right has been given more definition in recent years in statutes, taking it out of common law. In the same way the rights of teachers and principals have long included physical punishment and explusion. With the Supreme Court cases limiting the common law powers of school districts, statutes and administrative law have been enacted in many jurisdictions which limit the powers of administrators and teachers to punish children.

In Pennsylvania, the school code allows a teacher or principal to suspend a student temporarily for "disobedience or misconduct," but the educator must then report the administrative act to the secretary of the board of education or the district superintendent who submits the case to the board of eudcation for a "proper hearing" which will decide on the suspension or explusion of the student.[50]

Brazil's school code does not provide rights for students over and above those listed in the constitution for all who reside in Brazil.

A penalty is stated in the code for students who are found bringing into school for their own or someone else's use toxic substances or those which cause physical or psychic dependency of exclusion from school for the rest of the school year.[51] Carrying drugs is a criminal offense, but a judge can order a student who is believed not to understand the illegal character of the act to undergo psychiatric treatment in a hospital for whatever time is required for recuperation.[52] Capacity to understand the illegal nature of the act affects the penalty, and changes the punishment from penal to treatment in a hospital.[53] For a person found to be carrying or taking drugs between 18 and 21, it is obligatory for the judge to order him to treatment in a hospital.[54] The judge may order one under 18 to a hospital for treatment.[55] In all cases involving drugs in school, the penal code is to be applied, as well as the code of penal process.[56]

The United States Supreme Court has made it possible for those students who have been deprived of the right to schooling without due process to sue the school board for damages under the 42 U.S.C. 1983.[57] Such an action is unknown in the civil law jurisdictions. In our common law, the officers of the state are liable for their acts if they knowingly and willfully do not carry out the law and in so doing harm someone. This mixing of governmental and private liability is impossible in the civil law because whatever acts an officer of the law performs while carrying out the law are sanctioned by law. Private actions for damages can only be carried out for private acts, not public acts. While the government or agency can be blamed, an official cannot be. The error is the agency's

or government's, not that of an official acting under the law. Damages can be sought from the government or agency for the acts committed by it in error. In common law the government does not err, only individuals, or officials do.

The complicated structure of common law, its uneven development, its empirical nature which makes it rest on facts and precedents rather than theory or principles, and the wide discretion given to judges all make its development uneven and difficult to predict. Paradoxes abound in it and each advance in individual rights is balanced by the realization that other classes have not received such favorable treatment, or are even disadvantaged by the advance made by a certain group hitherto not privileged. Balancing the advances in rights against social needs, against resources to carry out the elevated responsibilities of governmental and private bodies to accommodate the advances ordered by courts is a difficult and divisive social process. The American common law has been a remarkably successful system partly because the people have had the patience to use the legal system, selectively, to accomplish their goals. If legislatures are unresponsive, courts are petitioned--at least since the 1950s. In an earlier era (1875-1937) legislatures were more responsive and courts dampened or killed off legislation advancing the rights of the under-privileged.

The American people and their courts showed restraint in upsetting the social balance. Minority members suffered while such restraint was exercised. Since the Warren Court, so much new law has been made by courts that we have not been able to assess the impact, nor to decide what

kind of balancing must be applied. If children receive full civil rights, for example, what parental rights over children are left-- and who decides what these are? If adolescents have increased freedom, are they to be protected from those who will exploit their newly found sexual freedom? And if adolescents are fully citizens, how does the law deal with those who exploit 13 and 14 year olds?

The civil law tradition is more explicit than the common law tradition in recognizing the duties of family heads in protecting the unemancipated minors. The civil law nations have, even with their concern for protecting their own national power, set limits on the degree to which the family organization can be weakened by the state. By contrast, the courts of the United States in the nineteen seventies checked the power of parents while enlarging the individual rights of their children. This has left children open for exploitation and abuse of a serious kind, even by those in public agencies, those doctors and nurses who feel they are helping the children in ignoring parental feelings and direction. Eventually the courts and the legislative bodies of the United States will have to decide to what extent it is possible to weaken the family structure and preserve other social institutions, such as the school, which depend upon the stability of the family. The skein of familial influences relate to every other social institution; we are not fully aware of what a further weakening of family and parental authority will cause in our society.

The civil law tradition moves more slowly and deliberately in establishing new doctrines of rights, but it also can protect children and their families and can prevent the very kind of abuses of children which our system has suddenly made possible.

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